United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1667

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket 74-1667

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP., Owners of the Steamship WESTERN EAGLE,

Plaintiffs-Appellees,

—against—

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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—against—

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Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

The Issues Presented for Review

1. Whether a warranty of workmanlike service arises in a contract to furnish tug assistance to a docking ship where the docking ship has not relinquished control of her navigation to the tug.

2. Whether, if it arises in a contract to furnish tug assistance, a warranty of workmanlike service is breached by a tug master's reasonable exercise of judgment in navigation.

3. Whether the WESTERN EAGLE was negligent in undertaking to proceed to her berth, under conditions of strong wind and current, and poor visibility, without having tugs in position to assist her.

4. Whether the WESTERN EAGLE having undertaken to proceed under adverse conditions without having tugs in position to assist her, the shipowner is required to bear its own loss.

Statement of the Case

This is an appeal by Chevron International Oil Company, Inc. from an Interlocutory Decree entered on March 21, 1974 (App. 314a) in the United States District Court for the Southern District of New York pursuant to an Opinion by the Honorable Lloyd F. MacMahon, sitting in Admiralty without a jury, entered on March 11, 1974 (App. 291a) awarding damages, interest and costs, in an amount to be determined and reported by a Special Master, in favor of plaintiffs-appellees, Fairmont Shipping Corp. and Fairwinds Ocean Carriers Corp., against defendant-appellant, Chevron International Oil Company, Inc.

Statement of the Facts

Fairmont Shipping Corp. and Fairwinds Ocean Carriers Corp., acting through their agent Norland Shipping & Trading Co., contracted to buy bunkers (fuel oil) for their vessel, the S/S WESTERN EAGLE, from Chevron International Oil Co., Inc. The contract provided, *inter alia,* that "ordinary tug assistance" was included in the price (App. 173a). The vessel was to take on bunkers at the Dutch

port of Flushing, at the Buitenhaven harbor (see chart, App. 150a). A local Dutch firm Steenkolen Handelsvereeniging (SHV), was the bunker supplier at Flushing and the owner of the local tugs, which were based in Buitenhaven.

The WESTERN EAGLE is a converted T-2 tanker of Liberian registry, with a length of 574′6″, a beam of 78′8″, a maximum draft of 33′7″, and a deadweight capacity of 23,622 tons. She was proceeding light in ballast to Flushing to take on bunkers. At about 3:45 A.M. on December 14, 1969, under conditions of high wind, strong following current, and poor visibility (App. 300a), the Dutch river pilot, L. J. Pennarts, boarded the WESTERN EAGLE in the River Scheldt at a position almost abeam of Buitenhaven, nearly a mile upriver from where a pilot usually boards. Late boarding was caused by the late departure of the pilot boat (App. 300a). After he came aboard Pennarts called by radiotelephone to announce his intention to bring the WESTERN EAGLE in and to order the SHV tugs to come out to assist (App. 300a).

Before the tugs came on the scene, the WESTERN EAGLE attempted to turn, since she had gone past Buitenhaven. Because of the strong southerly wind on her starboard bow, which was high out of the water, the ship swung to port instead of to starboard as intended, and Pennarts' attempts to correct this brought him "dangerously close" to the buoy on the south side of the channel (App. 301a). To avoid going outside the channel Pennarts stopped the ship's engines at 4:05 and then put the engines at full astern for several minutes (App. 177a, 301a).

When the tugs arrived and found the ship in trouble, they were directed to make fast "as soon as possible", the

tug FREDERIK HENDRIK on the port bow and the tug SOPHIA at the stern of the ship (App. 301a). As the tugs were attempting to make fast, a coasting vessel bound down the river approached and the engines of the WESTERN EAGLE were again put full astern, to avoid collision (App. 302a). The tugs moved to positions of safety, allowing the coaster to pass portside of the WESTERN EAGLE. Shortly thereafter a second downriver coaster approached on the WESTERN EAGLE's starboard side. The vessel's engines were stopped, and the second coaster maneuvered to pass on the WESTERN EAGLE's port side. The tugs, again fearful of collision, moved away from the WESTERN EAGLE (App. 302a).

The effect of the strong wind and tide continued to set the WESTERN EAGLE toward the northern shore of the Scheldt, and before the tugs could make fast, at 4:15 the WESTERN EAGLE fetched up against the dike. She was refloated later that day.

The trial court held that Chevron warranted the workmanlike performance of the tugs, that the warranty was breached because the tugs were unable to make fast to the WESTERN EAGLE in time, that Chevron was obliged to indemnify the WESTERN EAGLE's owners whether or not her own navigation was proper, and that her navigation was proper. We submit there is no such warranty on the part of one who merely undertakes to arrange for tug assistance, that in any event the tugs' performance was workmanlike, that the WESTERN EAGLE assumed the risk of proceeding without tugs and that her owners must bear their own loss.

ARGUMENT

POINT I

An implied warranty of workmanlike service does arise in a contract to furnish tug assistance to a docking ship where that ship has not relinquished control of her navigation to the tug.

The District Court found, and the finding is not challenged on appeal, that the bunker supply contract between vessel interests and Chevron included a term requiring Chevron to provide tug assistance to the WESTERN GLE at Flushing (App. 296a). This was on the basis Chevron's price list booklet, which states:

> "Following included in the price: Pilotage, harbor dues, clearance, quay hire, mooring, unmooring and ordinary tug assistance if required, provided vessel enters Flushing for purpose of bunkering only and lifts min. 150 tons" (App. 173a).

Chevron's contract was to sell bunkers, the price of ch included "ordinary tug assistance"; it was not a age contract. A contract to arrange for tugs to assist essel into a dock under her own steam and in charge ier master is not a contract of towage, but one of tug stance if, as in the present case, the master retains trol of the vessel's movements and remains responsible her navigation, *The McCaldin Brothers,* 213 Fed. 211 d Cir., 1914).

The trial court was, we submit, in error in implying a ranty of workmanlike service in a contract to arrange

tug assistance. Analysis of the cases in which the Supreme Court developed the doctrine of the implied warranty of workmanlike service shows that it is inapplicable unless control over the operation has been relinquished to the party from which indemnity is sought. Such a warranty was first applied to a maritime service contract in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1955), in which the Supreme Court held that even in the absence of an express agreement for indemnification, a stevedore is obliged to reimburse a shipowner for damages paid to a longshoreman injured because of the stevedore's improper stowage. The warranty was created to overcome the harsh rule of *Halcyon Lines* v. *Haenn Shipping Corp.*, 342 U.S. 282 (1952), which held that in non-collision cases there is no right of contribution between joint tortfeasors. Where, as in *Ryan*, the shipowner turned his vessel over to the control of the stevedore to stow cargo, the equitable result was that the stevedore became liable for damages incurred as a result of its employees' unworkmanlike performance.

The element of control has been recognized as the basis for the warranty in other maritime service contracts, and indeed the opinion of the court below makes special mention of this very point (inapplicable, however, to the facts of the present case):

> "The shipowner turns his vessel over to the tug's control, depending on the latter's expertise in conducting safe towing operations" (App. 298a).

In the instant case, Chevron did not hold itself out as a specialist in towing (in fact its supplier, SHV, furnished the tugs); it did not contract to perform towage; it did

not, and the tugs did not, assume control over the ship's movements. Chevron simply undertook to arrange tug assistance.

Relinquishing control to the contracting party was recognized by the Supreme Court as a necessary element of the warranty in *Italia Societa per Azione di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), where the Court applied the warranty to a stevedore contract when defective equipment injured a longshoreman during cargo discharging operations:

> "Oregon, a specialist in stevedoring, was hired to load and unload the . . . vessels . . . . Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations." 376 U.S. 315, 322-323.

The *Ryan* warranty is, therefore, limited to situations where control has been relinquished to the party performing the service. Thus, in *Hobart* v. *Sohio Petroleum Co.*, 445 F.2d 435, 438 (5th Cir. 1971), cert. denied, 404 U.S. 942 (1971), the Court of Appeals for the Fifth Circuit, noted:

> "When a shipowner has turned his vessel over to a stevedoring company, . . . and shipboard injuries result, it obviously seems unjust to hold the shipowner absolutely liable when he was, at the time of the accident, in no position to prevent the injuries. It is to alleviate the harshness of *Sieracki* absolute liability against shipowners in situations when the shipowner has relinquished control of his vessel and another party is better situated to prevent losses caused by ship-

> board injuries that *Ryan* indemnification is imposed. This, at least, is the message of Supreme Court opinions following *Ryan*. See [*Italia*]."

In *Singer* v. *Dorr*, 272 F. Supp. 931, 934 (E.D. La., 1967) the tug was held to have breached a warranty implied in a contract to tow a barge:

> "Both the barge owner and *Ryan* shipowner turn their vessels over to the complete control of another party but nevertheless remain absolutely liable for the condition of their vessels under the non-delegable duty to provide a seaworthy vessel. Thus assuming the initial seaworthiness of the vessel when control is transferred by the owner, the owner's liability to third persons can depend entirely on the actions of the party to whom control is transferred and who is under the implied obligation of workmanlike service."

This court has never held that a contract to furnish tug assistance contains an implied warranty of workmanlike service. In only one case, in a United States District Court in Louisiana, has it been held that such a warranty applies to a contract to assist a docking vessel, *T. J. Stevenson & Co.* v. *George W. Whiteman Towing, Inc.*, 331 F. Supp. 1038 (E.D. La., 1970). That case involved an injury on the vessel to a seaman when the assisting tug's defective line broke, and thus falls within the line of cases permitting indemnity when equipment unfit for the intended purpose renders a vessel unseaworthy and liable without fault.

Towage cases in which an implied warranty of workmanlike service has been found, have involved a "dumb" barge or scow, a "dead" ship, or a vessel otherwise incapable of self-propulsion or navigation at the time towage was under-

taken. We submit that the reliance of the court below on this line of authority was misplaced.

In *Tebbs* v. *Baker-Whitely Towing Company,* 407 F.2d 1055 (4th Cir., 1969), a tug was required to indemnify the U.S. Marshal, custodian of a "dead" ship (i.e., not using her own motive power or steering), for breach of an implied warranty of workmanlike service in failing to take precautionary measures prior to moving the ship. *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.,* 245 F.2d 84 (2nd Cir., 1957), involved a contract to tow a petroleum barge, and while being towed the barge was negligently permitted to strike a river bank. The Court applied the warranty to the towing contract and permitted the time charterer of the barge to recover against the tug. *Dunbar* v. *Henry Dubois Sons Co.,* 275 F.2d 304 (2nd Cir., 1960), cert. denied, 364 U.S. 815 (1960), concerned a non-self-propelled platform barge which capsized while being towed to a dredge site.

The court below also cited other towing cases clearly distinguishable on their facts: in *Farrell Lines, Inc.* v. *s/s Birkenstein,* 207 F. Supp. 500, 507 (S.D.N.Y., 1962), the question of the warranty was not reached by the court; *A/S Atlantica* v. *Moran Towing & Transp. Co.,* 360 F. Supp. 1225, 1227 (S.D.N.Y., 1973, rev'd —— F.2d ——, June, 1974), involved a pilotage clause and pilot's negligence; in *United States* v. *Tug Manzanillo,* 310 F.2d 220, 222 (9th Cir., 1962), a vessel crew member was injured on board the unseaworthy tug.

The court below relied especially (App. 307a-308a) on *Todd Shipyards Corp.* v. *Moran Towing & Transportation Co.,* 247 F.2d 626 (2nd Cir., 1957), to hold that Chevron entered into a towage contract. In that case Moran, itself

in the tugboat business, was held liable for the negligent operation of another company's tug dispatched by Moran to shift a scow between docks. For the reasons discussed above, *Todd* has no application to the instant case, since it involved a towage contract pursuant to which control over the "dumb" scow was turned over to the tug. Chevron is not a tug owner and never entered into a towage contract. Its undertaking was simply to provide ordinary tug assistance to a ship docking under her own power and control. Even if the arrangement were characterized as a towage contract, however, it was not the type of towage contract in which such a warranty should be implied, since control of the vessel's navigation was never relinquished to the tugs.

POINT II

Even if a warranty of workmanlike service were implied in a contract to furnish tug assistance to a docking ship, it was not breached by the tug masters' reasonable exercise of judgment in navigation.

We submit that the tugs breached no duty to the ship by waiting until the pilot ordered them to come out and breached no duty to the ship in being unable to make fast in time to prevent the stranding.

(1) *The tugs were under no duty to come out to assist the Western Eagle before the pilot radioed the order for them to come out.*

Nowhere in the record is there any evidence to suggest that the tugs were under any duty to come out before they were called by the pilot. Significantly, the trial court found as a fact that one of the reasons the tugs had not proceeded out before the pilot called was "because the sea pilot had

not ordered them to do so" (App. 300a). The other reason was that because there was fog, the tug captains expected that the WESTERN EAGLE would anchor (App. 300a, 305a)—surely a reasonable expectation in the light of the court's finding (App. 309a) that visibility on land was "poor", that conditions upriver were worse than at the pilot station, and that the fog was "heavy in some places". Significant, again, the court found that when he boarded the WESTERN EAGLE and called for the tugs, Pilot Pennarts "announced his intention to take the ship into Buitenhaven" (App. 300a).

The court found (App. 305a) that the tug captains knew the WESTERN EAGLE was bound for Buitenhaven, that she would need tug assistance to enter, and that the normal place for tugs to meet inbound vessels was a mile west of Buitenhaven. But they also knew that there was anchorage opposite Buitenhaven—in fact as the court noted, a British tanker was anchored there (App. 301a)—and that farther upriver there is a place where it is safe to turn without tugs (App. 304a). We submit that the fact that on boarding the WESTERN EAGLE the pilot radioed to advise that he was coming in and to order the tugs out to assist, establishes that there was no practice or duty for tugs to come out before they are called. There was no evidence that there was such a practice.

Nowhere does the court actually state that liability is being imposed on the ground that the "late" arrival of the tugs (as distinguished from what they did or didn't do *after* arrival) was a breach of duty or of warranty. The court did make the following comment:

> "The evidence shows that the stranding of the WESTERN EAGLE was caused by the inadequate assistance rendered by the SHV tugs. The tugs not only appeared

late (after the ship was well east of Buitenhaven) but, after the meeting the ship failed to make fast and provide any assistance to the WESTERN EAGLE as she drifted towards the northern shore" (App. 304a).

To the extent this may be deemed to constitute a conclusion by the court that the tugs' "late" appearance constitutes "inadequate assistance" in breach of a warranty of workmanlike service, it is, we submit, clearly erroneous, wholly without support in the evidence, contrary to the inferences to be drawn from the facts found, and flies in the face of logic. The issue is not whether the tugs arrived "late", as they unquestionably did (in the sense that it was too late to prevent the WESTERN EAGLE from being blown ashore), but whether they had any duty to arrive earlier. As a matter of law a duty cannot be created by the court from speculation.

(2) *The tugs' performance was workmanlike and proper.*

The standard of care owed by a tug is no more than competency and safety in the performance of the operation which it undertakes, *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co., supra,* 245 F.2d at p. 87. Since a tug is not an insurer against accidents, *Stevens* v. *The White City,* 285 U.S. 195 (1932), its duty depends upon "the circumstances of the case relating to control, supervision and expertise", *Tebbs* v. *Baker-Whitely Towing Company, supra,* 407 F.2d at p. 1059. Surely one who contracts to arrange and pay for tug assistance should have no greater liability than the owner of the assisting tug.

It is well settled that a tug is not at fault if her master, in an emergency, "did not do precisely what, after the event, others may think would have been best", *The Her-*

cules, 73 Fed. 255 (2nd Cir., 1896). In that case a tug pulling two coal-laden barges was caught in a storm and sank. The barge owner claimed that the master was negligent in starting the voyage in the face of a threatened gale and, once started, in failing to come to safety when the storm commenced. This Court held that under the circumstances, the risk of turning back was as great as the risk of proceeding and that as long as the tug master acted with an honest intent to do his duty and exercised the reasonable discretion of an experienced master, his judgment was not grounds for liability.

In determining what is reasonable, regard must be given to the circumstances which the tug master faced at the time. A court's exercise of hindsight does not support a finding of negligence, *M. P. Howlett, Inc.* v. *Tug Michael Moran,* 425 F.2d 619 (2nd Cir., 1970), cert. denied, 400 U.S. 833 (1970). This Court succinctly stated the principle as follows, in *Esso Standard Oil, S.A.* v. *The S.S. Gasbras Sul,* 387 F.2d 573, 580 (2nd Cir., 1967), cert. denied, 391 U.S. 914 (1968):

> "The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong."

In the present case it is obvious that the tugs' delay in making fast to the WESTERN EAGLE was not due to care-

lessness or oversight. It was deliberate: they were afraid there was not enough room for other traffic to pass if they remained alongside the WESTERN EAGLE. Instead of making fast, therefore, they moved away when the coasters approached (App. 18a-19a, 302a). The pilot testified:

> "Q. Were you concerned about a collision with the second coaster, is that the reason you stopped your vessel? A. Yes. I wanted to give her room.
>
> Q. So that the second coaster was close enough that you were concerned about a possible collision and that is the reason you gave stop? A. Yes." (App. 63a.)

In fact the first coaster passed only 30 to 40 meters from the WESTERN EAGLE and the second coaster, "very close," only "a few meters" away, barely visible through the dense fog (App. 217a-218a). The tugs were 36 meters long and 8 meters in beam (App. 190a).

The court below recognized that the tugs "feared a collision with the coasters," but made the curious observation that the pilot's statements "fail to show that he believed there was any danger that the tugs and coasters would collide" (App. 306a). The testimony quoted above does show, however, that the pilot *was* concerned about a collision, and obviously if a tug was between the WESTERN EAGLE and a coaster, the collision would be with the tug. Further, the pilot never said he believed there was no danger to the tugs, and we submit that an opinion contrary to the tug masters' opinions cannot be established by a negative pregnant.

The court below apparently agreed that the reason why the tugs did not immediately carry out the pilot's order was that they were afraid that to obey such an order might

cause them to come into collision with one or the other coaster (App. 306a). Where a pilot's order is obviously dangerous, a tug is not required to carry it out. On the contrary, a tug master is required to exercise discretion in carrying out obviously dangerous orders, *The Edward G. Murray,* 278 Fed. 895 (2nd Cir., 1922). A tug is also charged with the duty to keep clear of an approaching vessel, and even though under the direction of a pilot, the tug must act independently to keep herself and the tow from collision, *The Civilta,* 103 U.S. 699 (1880).

POINT III

The Western Eagle was negligent in undertaking to proceed to her berth under conditions of strong wind and current and poor visibility without first having tugs in position to assist her, and assumed the risks of so proceeding.

The court below dismissed the allegation of fault on the part of the WESTERN EAGLE with the observations that "mere concurrent fault of the shipowner will not excuse the breach of warranty" of workmanlike service (App. 308a) and that since "dense fog conditions were not present, . . . the WESTERN EAGLE need not have anchored" (App. 309a). As to the first (assuming a warranty), the answer is, in the court's own wording of the criterion: that "the conduct of the shipowner prevented or seriously handicapped the tugs in their attempt to perform in a workmanlike manner" (App. 308a). As to the second, while fog may not have necessitated going to anchor, the WESTERN EAGLE's navigators should not have allowed her to get into a position of danger before the tugs were actually alongside and

made fast. There was, in other words, an assumption of risk, and the gamble having failed, the shipowner should not be permitted to shift the burden of the loss to someone else.

On the court's findings, the WESTERN EAGLE's pilot was in trouble (App. 304a), was being set by wind and tide onto a lee shore (App. 307a), and her position when the tugs met her "limited the effectiveness of the tugs' assistance to the WESTERN EAGLE" (App. 306a), i.e., it met the test that it "seriously handicapped" the tugs in their efforts to assist.

The court below concluded that the fog was not dense enough to compel the WESTERN EAGLE to anchor. But, we submit—and the court made no finding as to this—the WESTERN EAGLE surely assumed the grave risks inherent in proceeding without tugs past the normal tug meeting place, being in ballast with a force 5-6 wind (about 20 knots) blowing on-shore, on a strong following tide (which made maneuvering more difficult except at high speed), with half-mile visibility in variable fog at night, into a confined area where there was other traffic. Thus to summarize the situation demonstrates the foolhardiness of the WESTERN EAGLE's navigators.

How the problem came about is not in dispute (App. 300a-301a). Because his pilot boat was late leaving the pilot station, Pilot Pennarts boarded the WESTERN EAGLE opposite the entrance to the bunkering harbor (Buitenhaven), a mile above where he had meant to board; because the pilot was late in getting aboard, he was late in ordering the tugs to come out from their Buitenhaven station; and because the order was late, the tugs were late in arriving at the vessel's side.

The pilot knew he was late in boarding (App. 304a), he knew he was then a mile past the normal place to meet tugs (App. 305a), and he obviously knew the tugs were not already on their way out (otherwise why did he radio to tell them he was going to bring the ship in and for them to come out?). The WESTERN EAGLE had radar, and therefore the means to confirm that the tugs were not on the way and that the vessel was already opposite Buitenhaven when the tugs were ordered. Instead of proceeding on up river to a safe place to turn, the pilot took a chance that the tugs would arrive and be able to make fast in time, and tried to turn the ship in a narrow area, without tugs, with a following current and an on-shore wind which made the light tanker unmanageable as soon as she slowed down to turn. The pilot's

> ". . . decision to turn the ship just after No. 1 buoy was based on his assumption that the tugs would make fast and assist the ship. The evidence shows that the WESTERN EAGLE was unable, by the force of her own engines, to make progress against the wind and the tide. Only with the aid of the tugs could the vessel have avoided grounding." (App. 305a.)

We submit that the navigators of the WESTERN EAGLE were negligent in allowing their vessel to get into this situation of great danger, danger not only to the vessel and those aboard her but also to the tugs, and their crews. There was no reason why the pilot could not have taken the vessel on up river to turn at a safe point (App. 304a). Pilot Pennarts failed to take into consideration that other traffic in the river might interfere with the operation of making the tugs fast immediately upon their arriving alongside the WESTERN EAGLE, as in fact occurred. Because

of adverse weather conditions he was, as the court found (App. 304a), in trouble, and that he would be in trouble should have been obvious to him.

CONCLUSION

The Owners of the WESTERN EAGLE must bear their own loss. The judgment of the United States District Court for the Southern District of New York in favor of the plaintiffs should be reversed, with costs to appellant, and the case remanded with direction to enter judgment dismissing the complaint, with costs to defendant.

Respectfully submitted,

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Service of (3) copies of the within Brief
is admitted this 2nd day of Jan. 1974

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